HARRY N. BAILEY

IBLA 83-48 Decided March 23, 1984

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting proposed private land exchange, NM 52924.

Affirmed.

1. Exchanges of Land: Generally -- Federal Land Policy and Management Act of 1976: Exchanges -- Private Exchanges: Generally

While there is no Departmental policy absolutely forbidding multi-party exchanges under sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1976), no such exchange can be approved unless the land ultimately acquired by the United States benefits a Federal natural resource management program.

2. Federal Land Policy and Management Act of 1976: Exchanges -- Private Exchanges: Public Interest

The fact that land sought in a private exchange is within a known geothermal resource area and is actually under lease is normally sufficient to support a finding that the land sought by the private party is more valuable for public purposes than the land which is being exchanged.

APPEARANCES: Harry N. Bailey, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Harry N. Bailey has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated August 23, 1982, rejecting a proposed land exchange involving public lands in the Fort Selden area. This rejection was primarily premised on a finding that the proposal would not benefit the public interest.

Consideration of this exchange has been an on-going matter since it was first proposed in 1977. As originally proposed in a letter dated February 5, 1977, the exchange involved three separate transactions involving a total of four parcels. Thus, it was suggested that BLM would exchange a parcel of land (either any one of secs. 31 thru 36, T. 19 S., R. 1 W., or sec. 31,

T. 19 S., R. 1 E., New Mexico principal meridian) 1/ for a parcel of land owned by New Mexico State University (NMSU) (sec. 2, T. 21 S., R. 1 W.). BLM would then exchange the land it acquired from NMSU with appellant for a parcel of land which he owned adjacent to the Fort Selden State Monument in sec. 28, T. 21 S., R. 1 W. BLM would then exchange the land acquired from appellant for certain land owned by the State of New Mexico in the Organ Mountains.

Appellant suggested that this proposal would benefit all parties involved. NMSU would acquire land more convenient to administer for purposes of maintaining an experimental range than that which they presently had. Bailey would acquire lands in the vicinity of other lands which he already owned near Radium Springs which would permit him to develop a hot springs health and recreation resort. 2/ The State of New Mexico would acquire lands which the Museum of New Mexico desired in order to protect the State Monument at Fort Selden. Finally, BLM would acquire lands which appellant thought were desired by the District Manager, Las Cruces.

This first proposal, however, ran into immediate problems concerning sec. 2, T. 21 S., R. 1 W., which was to be exchanged by NMSU for other Federal land. Initially, BLM was of the view that the offered land was already Federal land which had been temporarily withdrawn by Exec. Order No. 4554 of December 17, 1926, for the NMSU experimental ranch and that this withdrawal was made permanent by Public Land Order No. (PLO) 4263, 32 FR 11876 (Aug. 11, 1967). See Letter of September 9, 1977, from the Acting State Director to Senator Schmitt. This proved not to be totally correct.

Executive Order No. 4554 withdrew certain described lands in New Mexico in aid of legislation then pending concerning the NMSU experimental ranch. The only lands in T. 21 S., R. 1 W., which were withdrawn, however, were secs. 1 and 12. Subsequently, Congress enacted the Act of March 2, 1927, 44 Stat. 1294, which granted various lands to the State of New Mexico for use in its experimental ranching program. Included in these lands were sec. 1 and the E 1/2 sec. 12. In this Act, however, Congress reserved all minerals within the granted lands together with the right to mine and remove the same. PLO 4263 did not make the withdrawal effectuated by Exec. Order No. 4554 permanent; rather, it withdrew the mineral interests in the granted lands from entry under the mining laws. Sec. 2, T. 21 S., R. 1 W., however, was never affected by any of these actions.

The initial confusion as to the ownership of sec. 2 was occasioned by the fact that it is situated within the boundaries of the NMSU experimental ranch, and had at one time been clearlisted to the State pursuant to its Statehood grant. This land, however, was reacquired by the United States in a later exchange with the State for reasons which are no longer clear. It seems obvious that NMSU was unaware of this last transaction. In any event, as the State Director subsequently informed the Director, BLM, by memorandum of April 6, 1978, not only was sec. 2 already public land, but there was "no record that use of this section by NMSU was ever authorized in any way."

1/ Actually, secs. 32 and 36, T. 19 S., R. 1 W., were owned by the State, not the Federal Government.
2/ Appellant owns only 280 acres in secs. 2 and 3. He has a grazing lease from the United States for the remaining portions of those two sections.

In addition to the problem concerning the ownership of the lands which NMSU would convey to the United States, the District Manager, Las Cruces, informed appellant by letter of February 15, 1977, that sec. 2 could, itself, not properly be classified for disposal because it was within a known geothermal resource area (KGRA), and there was a possibility that the south half of the section might contain rare and endangered wildlife, with an additional likelihood that the entire section might contain important archaeological sites.

Realization that sec. 2 was presently in Federal ownership obviously necessitated modification of appellant's proposal. NMSU had originally consented to the exchange on the expectation that it would acquire land in T. 19 S., R. 1 W. Since BLM could clearly not exchange Federal lands for other lands already in Federal ownership, this part of the arrangement could not possibly be consummated.

By memorandum of April 6, 1978, the New Mexico State Director advised the Director, BLM, as to the status of the proposed exchange. In this memorandum, the State Director stated his opposition to the proposed exchange, giving four reasons therefor:

> 1. Land use planning in the area has not been completed and the BLM cannot entertain exchange proposals under Section 205 of FLPMA [Federal Land Policy and Management Act of 1976] where planning has not been completed.
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> 2. Regulations relative to the reservation of minerals under Section 209 of FLPMA have not yet been prescribed. It can be anticipated, however, that when high subsurface values are known, as in the subject case, the regulations will limit surface uses and may prohibit disposition of the surface estate.
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> 3. Even though Mr. Bailey has indicated agreement to the reservation of thermal rights it would appear that his development would be in direct conflict with geothermal resource development. To allow separation of the surface and subsurface estate in this situation would constitute gross negligence on the part of BLM and would be contrary to the exchange criteria of Section 206 of FLPMA.
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> 4. The potential development of the geothermal resource is more in the public interest and of a greater value to the local, regional, and national economy than the potentially proposed private development.

At approximately the same time, appellant was in communication with the District Manager with reference to the proposed exchange. In a letter received April 7, 1978, appellant noted that he had revised the proposed exchange so that now it would be initiated by an exchange between the United States and the State of New Mexico in which the State would receive title to sec. 2, while the United States would acquire sec. 36, T. 19 S., R. 1 W. The State would then exchange sec. 2 for the parcel of land adjacent to Fort Selden owned by appellant. Adverting to the prior objections of BLM, appellant stated:

> In accepting title to Section 2, we are agreeable to the Government retaining the geothermal rights and reserving sufficient surface area to take care of normal needs, for access and drilling activities. Should geothermal power production prove teasible, we would provide adequate surface area for such facilities and easements, as would be necessary during the period of need. With respect to any rare wildlife or archaeological sites, there will be set aside in a protective open area to be provided in the future Resort master plan.

By letter of April 27, 1978, the District Manager, in essence, denied appellant's exchange proposal "until the full extent of the geothermal potential of the lands in and adjacent to Section 2, T. 21 S., R. 1 W., NMPM, is fully known."

Subsequently, however, the Assistant Secretary for Land and Water Resources, while agreeing that BLM could not grant the requested exchange until the geothermal resources of sec. 2 had been evaluated, directed that BLM consider appellant's proposal during the development of the land use plan for this area pursuant to section 202 of FLPMA, 43 U.S.C. § 1712 (1976).

While development of the land use plan for the South Rio Grande planning unit was progressing, subsequent submissions by appellant made it clear that acquisition of sec. 2 was merely the first part of a long-range development plan which would, in the second phase, involve "public acquisition" of secs. 3 and 4, T. 21 S., R. 1 W., and ultimately require similar "public acquisition" or lease of nine additional sections of land for housing, recreational facilities, schools, parks, hospitals, sanitariums, retirement homes, and supporting services.

Development of the land use plan for the area took place over the next 3 years. During this time, appellant proposed various modifications and conditions with reference to his proposed acquisition of sec. 2 to assure that his proposed development (now referred to as an Energy Industrial Park) would not interfere with possible development of geothermal power. In addition, support for the project was expressed by the Governor of New Mexico, the Dona Ana County Commission, and the New Mexico Congressional delegation. Appellant was kept informed as to the development of the plan and commented insofar as it affected his proposed exchange.

By letter of August 13, 1981, appellant was informed that the draft management framework plan recommended rejection of the proposed exchange, but that no final decision would issue until completion of the process, then estimated to occur in December 1981. BLM decided to solicit the views of Hunt Energy Corporation (Hunt) and Chevron U.S.A., Inc. (Chevron), who held geothermal leases in the area.

By separate letters, both Hunt and Chevron indicated their opposition to any proposed exchange. Hunt, in a letter dated January 27, 1982, stated it could support an exchange only if it were given the absolute right of first refusal to purchase the lands. These views were supplemented in a letter dated February 10, 1982. Hunt detailed its activities in the area, noting that it had spent approximately $7,000,000, had developed a potentially producing well less than half a mile from sec. 2, and had spent $110 an acre for a lease on sec. 2, which it considered to be the most valuable

acreage in the entire prospect. Chevron was equally opposed to the exchange, arguing that such an exchange could severely restrict future exploratory activity by industry in the area, and reaffirming its belief that title to both the surface and mineral estates should be retained by the United States.

By letter of February 19, 1982, NMSU informed the State Director that it had reconsidered its opinion and no longer felt that completion of the proposed exchange would be in the best public interest, primarily because of the extensive geothermal developments which already existed and in view of the possibility of future problems concerning access.

By letter of May 7, 1982, the District Manager, Las Cruces, rejected appellant's proposed exchange. While he noted that the Southern Rio Grande Management Framework Plan had called for the collection of additional data concerning geothermal potential in the area, he pointed out that BLM had recently received correspondence from Hunt and Chevron which indicated that they supported retention of the land in Federal ownership. The letter concluded that: "Based on this information, it is our conclusion that the public interest would be better served by retaining the lands in Federal ownership and continuing to make them available for further geothermal energy development. Therefore, it is my decision that your exchange proposal is not accepted." Bailey was advised that he could protest this action to the State Director pursuant to the procedures set out in 43 CFR 2201.2(c) and (d). The applicable regulation, 43 CFR 2201.2(c), provides that:

> If requested in writing by the proponent within 30 days of the mailing of the notification of non-acceptance, the decision of non-acceptance of the authorized officer shall be reviewed by the State Director to determine if it is in accordance with the Bureau of Land Management policies, programs and the regulations in this part. Such review shall be completed by the State Director and the proponent notified in writing of the action taken within 60 days of receipt of the written request by the State Director.

By letter of May 14, 1982, appellant filed a notice of protest to the District Manager's decision.

Subsequently, appellant filed an expanded statement reviewing in some detail the background of his proposal and its justification. In this, he noted that NMSU had once again reversed its position and now favored the exchange. In addition, he submitted a letter from Hunt which indicated that it might have been misinformed as to the exact nature of the proposed exchange. That letter, dated June 2, 1982, stated:

> As I explained to you in our recent conversation, Hunt's opposition to the exchange was based on a letter from the BLM stating that both surface and subsurface estates were involved. If only surface rights are involved, as you explained in your letter, Hunt may be willing to reconsider its position but not necessarily change its position.
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> Since the BLM has made a decision on the exchange, we will not be able to reconsider unless we are notified by the BLM that the matter has been reopened. If that should happen, we will

> request clarification of the proposal from all parties concerned, but Hunt will not instigate any action to reopen the case.

By letter of August 23, 1982, the State Director denied appellant's protest and affirmed rejection of the proposed exchange. The action of the State Director was premised on two separate considerations. First, he noted that the proposal did not offer lands which would benefit the Federal resource management program, but rather was designed to benefit other third parties, and would require multi-party negotiations to consummate. He stated that "Departmental policy, as expressed by the attached documents, specifically prohibits such an exchange."

The second basis for his decision was the fact that sec. 2 was within a KGRA, and was under competitive lease. Noting that the most recent statements of expression from the geothermal lessees indicated an opposition to the severance of the mineral estate from the surface estate, the State Director also pointed out that under 43 CFR 2093.0-3(a) no lands classified as valuable for any leasable deposit may be disposed of without the prior finding by the authorized officer with the concurrence of the Director, Geological Survey, that such disposal will not "unreasonably interfere with current or contemplated operations under the Mineral Leasing Acts." The State Director expressed the view that quite independent of BLM's responsibility to insure proper development of this resource value, there was every reason to believe that Geological Survey would not approve a disposal contrary to the expressed concerns of the geothermal lessees. From the decision of the State Director, appellant has pursued this appeal.

In his statement of reasons in support of his appeal, appellant has basically reiterated his view that the three-way trade would be of benefit for all concerned. He specifically referenced the June 2, 1982, letter from Hunt which indicated, appellant argued, "that Hunt was misinformed as to the character and content of our plan, which by then indicated a commitment to donate a portion of Section 2 to the N.M.S.U. for its proposed Geothermal Research Center." In summary, he felt that there should be a "broader and more realistic interpretation of what constitutes a land trade resulting in 'best public interest.'"

[1] We note that the State Director suggested that because the proposed exchange involved multiple parties and would require third-party negotiations that it could not be considered in the public interest. We do not agree.

> The documents which the State Director referenced as establishing a Departmental policy against such exchanges did not really purport to do so. Thus, the letter of May 30, 1980, from the Deputy Director, BLM, to Congressman Lujan, involving consideration of a different exchange, expressly noted that the District Office, "approached the State with the three way exchange proposal since it appeared to be of mutual benefit to all three parties." That exchange was set aside not because multiple exchanges were involved, but because the State opposed it.
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> Similarly, the letter from Secretary Watt to Senator Simpson of Wyoming, dated November 9, 1981, which rejected a proposed exchange of land in the vicinity of Gillette, Wyoming, did not reject the proposal because of the multiplicity of parties, but rather because the only purpose of the exchange

was to put land in Federal ownership which would then be available for acquisition by the city of Gillette under the Recreation and Public Purposes Act. Thus, Secretary Watt rejected the proposal because "acquisition of non-Federal land for the stated purpose and intent to transfer such newly acquired public lands out of Federal ownership to another conveyance would not be considered to be in the public interest."

Our view of these policy statements is not that they establish a policy which is preclusive of multiple party exchanges, but rather one which requires that the land ultimately acquired by the Federal Government have some benefit to the Federal natural resource management programs. This is, we think, the key thrust of the two documents referred to by the State Director.

[2] Exchanges of public land for private land are authorized by section 206 of FLPMA, 43 U.S.C. § 1716 (1976). That section authorizes an exchange of land upon a finding that the public interest will be "well served" provided that:

> [W]hen considering public interest the Secretary concerned shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the value of the non-Federal lands or interests and the public objectives they could serve if acquired.

43 U.S.C. § 1716(a) (1976). Thus, the Secretary is required to find, as a precondition of agreement to the exchange, that the land to be acquired by the United States is no less valuable for public purposes than the land being exchanged. It is difficult to see how that finding could be made in the instant case.

For one thing, there is no indication, whatsoever, that the lands which the United States would ultimately acquire in the Organ Mountains would be of any value for Federal management purposes. On the other hand, the continued importance of sec. 2 to the geothermal leasing program is clear from the record. While we do not feel that this factor is controlling, the objections of the geothermal lessees is certainly a consideration that does not weigh favorably on appellant's side of the ledger in considering ultimate public interest. 3/

Moreover, it is apparent from appellant's more recent submissions that the exchange for sec. 2 is but the first step of a program which envisions acquisition of a much larger area of the public domain. A piecemeal approach to such an exchange should be avoided, particularly since, once started, internal dynamics might well necessitate continuation of a program which would not have been initiated had the ultimate effects been clearly understood at the start.

3/ In this regard, Chevron has apparently not changed its position, and the most recent letter from Hunt merely indicates that it might alter its position if it were necessary to reconsider the matter.

In any event, we think it clear that this exchange could not possibly be approved as presently proposed. As proposed, the exchange would require the State of New Mexico to exchange sec. 2 (having first acquired that from the United States), with appellant for the parcel of land adjoining the Fort Selden State Monument. The Director of the Surface Division of the Commission of Public Lands of the State of New Mexico, however, has informed BLM that the Commission lacks authority to exchange state land with a private individual, nor could it, after acquiring the land adjacent to Fort Selden, transfer it to the Museum of New Mexico. Thus, the present exchange proposal could not possibly be effectuated.

The decision of the State Director and that of the District Manager, Las Cruces, fully considered the relative merits of the proposal not only from the point of view of the Federal Government but with due regard for the needs of the local community. Indeed, the Associate State Director for New Mexico has already noted that proposals by the city of Las Cruces and Dona Ana County for land acquisition would be given priority over private exchanges. We recognize the considerable efforts which appellant has expended to effectuate the exchange. It may be that, at some future point in time, a similar proposal will commend itself to BLM. But based on the record before us, we cannot say that the rejection of the instant application for exchange was improper. Thus, we have no choice but to affirm the decision below. 4/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr
Administrative Judge

4/ We note that by letter received on Mar. 19, 1984, appellant informed the Board that he was pursuing an exchange which involved public land in New Mexico and private lands in Arizona. Appellant suggested that the Board might wish to postpone adjudication of this appeal. It seems clear, however, that the proposal before the Board is totally independent from the one now being pursued by appellant and therefore there is no reason to suspend consideration of the instant matter. Our decision herein shall, of course, have no effect on appellant's latest exchange proposal.